United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

### Advice Memorandum

DATE: April 4, 2003

TO: Rochelle Kentov, Regional Director Margaret Diaz, Regional Attorney

Karen K. LaMartin, Assistant to Regional Director

Region 12

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Sheet Metal Workers, Local 15

(Brandon Regional Hospital) 536-2536-6000 Case 12-CC-1258 560-2575-6767-2500 560-5067-4050

> 560-7540-8060-6717 578-8075-8050-7000 578-8075-8050-7700

This case was submitted for advice as to whether the Union violated Section 8(b)(4)(i) and (ii)(B) by handbilling in front of a hospital and near an inflated rat caricature.

We conclude that the Union violated Section 8(b)(4)(ii)(B) by making false and misleading statements regarding the Hospital and its involvement in a labor dispute and by using a large inflated rat to discourage consumers from patronizing the Hospital, and thereby unlawfully coercing the Hospital to cease doing business with a subcontractor. Accordingly, the Region should issue a Section 8(b)(4)(ii)(B) complaint, absent settlement. The Region should dismiss the 8(b)(4)(i)(B) allegation, absent withdrawal.

#### **FACTS**

Brandon Regional Hospital (the Hospital) is a 277-bed acute care hospital in Brandon, Florida. The Hospital employs about 1,500 employees.

The Hospital's campus covers approximately 19 acres. The front (north side) of the Hospital faces Oakfield Drive, which runs east and west. The east side of the

<sup>&</sup>lt;sup>1</sup> [FOIA Exemption 5

campus is bordered by Parsons Avenue; the west side of the campus is bordered by Vondenberg Drive.

In December 2001, the Hospital began construction on its South Tower, to be completed in 2004. Phase I of the project ended in December 2002, Phase II began in September 2002 and is ongoing. Anticipating that certain contractors might work on Phase I, Sheet Metal Workers, Local 15 (the Union), twice served the Hospital with written 8(g) notices of its intention to picket. The first notice was made by letter dated March 11, 2002, wherein the Union advised the Hospital that the Union would "establish a picket line at the Hospital" if Sea Breeze Associates [a non-union contractor] worked on the South Tower project. The Union's second notice was made by letter dated May 9, 2002, wherein the Union advised the Hospital it would "establish a massive picket line" if Sea Breeze, Express Metals, Inc., Mechanical Construction Service, or Massey Metals [nonunion contractors] worked on the South Tower project. Ultimately, none of the named contractors worked on Phase I and the Union did not engage in any traditional picketing. Although Massey Metals was awarded sheet metal work for Phase II, the Union has not engaged in traditional picketing, nor has it advised the Hospital of its intention to do so.

Approximately 150 - 160 construction workers are employed on Phase II of the South Tower project, including four (4) employees of Workers Temporary Staffing (WTS) who perform unskilled labor; two WTS employees work for Massey Metals, and two work for Walmark, another sheet metal contractor working on the South Tower project.

Construction workers park in a parking lot west of the campus, walk across Vondenberg Drive north of the South Tower project site, and enter the site on foot through the Hospital's ambulance driveway. Most construction vehicles and equipment access the site from Parsons Avenue, using a campus driveway located about 200 yards south of Oakfield Drive. Some construction vehicles access the site using a driveway that runs east from Vondenberg Road; occasionally, construction equipment enters the campus through one of the visitor entrances.

Visitors drive onto the campus from Oakfield Drive. One visitor entrance is located at the entrance to one of the Hospital's parking garages northeast of the Hospital's main entrance; the other visitor entrance is approximately 150 yards west, at the intersection of Oakfield Drive and Moon Avenue near the entrance to the Hospital's Women's Center. Most Hospital employees park in a lot east of the

campus and use a pedestrian crosswalk to cross Parsons Avenue and enter Hospital property.

Since January 9, 2003, 2 Union agents have, each weekday from about 7:30 a.m. to 2 p.m., deployed a trailer carrying a 12 - 15 foot tall inflated rat caricature to a public easement along Oakfield Drive, roughly equidistant between the Hospital's two visitor entrances. 3 The inflated rat stands upright, smiling, with a cigar in its mouth. The Union has pasted "Workers Temporary Staffing" to the rat's torso.

Contemporaneous with the deployment of the inflated rat, two to three (2 - 3) Union agents have distributed handbills in front of the rat, along Oakfield Drive at the visitor entrances to the Hospital, and near a pedestrian walkway used by Hospital employees.<sup>4</sup> The headline at the top of each 8½ x 11 inch handbill states, in large bold print, that "There's a 'Rat' at Brandon Regional Hospital." Below the headline is a caricature of WTS as a rat sitting on the floor of a hospital room. Behind the rat, a janitor appears to be cleaning up rat droppings as a nurse tends to an ailing patient. Immediately below the cartoon, in smaller bold type, is the following text:

Workers Temporary Staffing (WTS) is a temporary employment agency that employs workers on the construction site of the South Tower expansion project at Brandon Regional Hospital.

We consider a "rat employer" to be one that undermines the wages, benefits and other working conditions established by our local labor agreement or otherwise violates workers' rights.

We consider Workers Temporary Staffing to be such an employer. In fact, Workers Temporary Staffing is

<sup>&</sup>lt;sup>2</sup> All dates herein are 2003 unless noted otherwise.

<sup>&</sup>lt;sup>3</sup> The Region describes the inflated rat as standing 20 - 25 feet tall. Our review of Employer-submitted photographs showing the rat next to Union agents, however, suggests that the rat is somewhat smaller than the Region estimates.

<sup>&</sup>lt;sup>4</sup> An Employer witness reports that only two to three (2 -3) agents handbill at any one time, but as many as seven to eight (7 - 8) different Union agents have handbilled near the Hospital. From January 9 to 15, one Union agent allegedly held his handbills over his head or out to the side to make them visible to drivers and pedestrians.

currently being investigated by the Federal Government for possible labor law violations.

It's just a matter of common sense. If the actions of companies like Workers Temporary Staffing are tolerated, it will undermine the living standards of our entire community.

After January 15, the Union's handbills included the following disclaimer, in smaller print at the bottom of the handbill:

This flyer does not intend, nor does it ask any employee to cease work or cease deliveries, nor does it ask anyone to take any action against Workers Temporary Staffing or Brandon Regional Hospital.

In response to the handbilling, the Hospital on January 15 attempted to establish a reserve gate system. The Hospital identified the Parsons Avenue entrance used by most construction vehicles as "Gate A," the reserve gate for neutral employers, their employees, visitors, contractors, and suppliers. The Hospital cut through a section of wooden fence about 30 yards south of the ambulance driveway to create "Gate B," to be used by WTS and its employees, visitors, contractors, and suppliers exclusively. Despite the Hospital's designation of gates, the Union has continued its activity on the public easement near the main entrances along Oakfield Drive.

There is no evidence that Union agents have patrolled, blocked traffic, or become involved in any confrontation with pedestrians, employees, or drivers.

#### ACTION

The Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(4)(ii)(B) by intentionally making false and misleading statements about the Hospital's involvement in a labor dispute and by engaging in conduct tantamount to picketing in order to cause consumers to boycott the Hospital. The Region should dismiss the 8(b)(4)(i)(B) allegation, absent withdrawal; the Union's conduct was directed only at consumers, there is no evidence that Union agents induced or encouraged any employees to cease work.

# A. <u>The Union's Intentionally Misleading</u> <u>Communications Unlawfully Coerce The Hospital And Other</u> Neutrals To Cease Doing Business With WTS

"Section 8(b)(4) proscribes picketing and "all [union] conduct . . . inten[ded] to coerce, threaten, or restrain third parties to cease doing business with a neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective."  $^5$ 

Mere persuasion of customers not to patronize neutral establishments does not, in and of itself, coerce the establishments within the meaning of Section 8(b)(4)(ii)(B). On the contrary, the Supreme Court in DeBartolo II concluded that a union's peaceful distribution of area standards handbills urging a consumer boycott of neutral employers did not constitute "restraint or coercion" under Section 8(b)(4)(ii)(B). The Court noted that there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving non-speech elements. Thus, because of the First Amendment considerations, the Court interpreted the phrase "threaten, coerce, or restrain" with "'caution,'" and not with a "'broad sweep'" to exclude non-picketing activities partaking of free speech.

The First Amendment, however, does not protect knowingly false statements, or statements made with reckless disregard of whether they are false. 9 Accordingly, the Board "tolerates intemperate, abusive and inaccurate statements made by [a] union during attempts to organize employees, [but] it does not interpret the Act as giving either party license to injure the other intentionally by

<sup>&</sup>lt;sup>5</sup> Teamsters Local Union No. 122 (August A. Busch & Co.), 334 NLRB No. 137, slip op. at 15 (2001). See also Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (citations omitted).

<sup>6</sup> Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568 (1988)
7 485 U.S. at 574-77.

 $<sup>\</sup>frac{8}{10.}$  at 578 (quoting NLRB v. Drivers, 362 U.S. 274, 290 (1960)).

<sup>9 &</sup>lt;u>New York Times Co. v. Sullivan</u>, 376 U.S. 254 (1964).

circulating defamatory or insulting material known to be false.  $^{"10}$ 

Thus, intentionally misleading communication transforms otherwise lawful union activity into coercive secondary conduct if it is designed to enmesh a neutral employer in a labor dispute. For example, in San Antonio Community Hospital, 11 the Ninth Circuit determined that a union's banner declaring, "THIS MEDICAL FACILITY IS FULL OF RATS," was "fraudulent language . . . directed at an entity with which no labor dispute exist[ed.]"  $^{12}$  The union there claimed that its banners, and its use of the term "rat" in particular, were intended to publicize the union's dispute with the primary employer, a construction subcontractor. The Ninth Circuit, however, noted that the union failed to explain the context for the term "rat," and failed to clarify that the hospital in that case was not involved in the labor dispute. In those circumstances, "the most natural reading" of the banner would be that the hospital had a rodent problem, which the union conceded was untrue. Accordingly, the Ninth Circuit held that the union's use of the term "rat" was "fraudulent, deceptive, . . . intended to mislead the general public" and, therefore, was not protected speech under the First Amendment. 13 San Antonio Community Hospital is consistent with the Supreme Court's decision in Tree Fruits<sup>14</sup> and with Board law interpreting that decision. 15

Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 61 (1966). See also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283 (1974) (applying the standard annunciated in New York Times and Linn, the Court found use of the term "scabs" in a union newsletter to describe certain employees was not a "reckless and knowing falsehood" but was "literally and factually true").

<sup>&</sup>lt;sup>11</sup> 125 F.3d 1230 (9<sup>th</sup> Cir. 1997).

 $<sup>^{12}</sup>$  <u>Id</u>. at 1235.

 $<sup>^{13}</sup>$  <u>Id</u>. at 1236 - 1237.

<sup>14</sup> NLRB v. Fruit and Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58 (1964)(unions may appeal to customers of a retail store not to buy products of struck firms, but they may not use ambiguous language to attempt to persuade customers not to trade at all with a secondary employer).

<sup>15</sup> See, e.g., Local 248, Meat & Allied Food Workers, 230
NLRB 189, fn. 3, (1977) enfd. 571 F.2d 587 (7<sup>th</sup> Cir. 1978),

By deploying a tall inflated rat directly in front of the Hospital's main entrance, the Union intentionally misled the public generally, and patrons and visitors to the Hospital specifically, by falsely portraying the Hospital as the primary target of the Union's campaign. The Union's misleading message was advanced, rather than clarified, by the illustration used in the Union's handbill. Thus, the union's provocative use of the "rat" in this case constitutes knowingly false statements and, therefore, does not implicate the First Amendment concerns raised in DeBartolo II.

Unions' use of the term rat and rat caricatures to convey to the general public that an employer operates nonunion or otherwise fails to meet area standards has been well-documented. 16 By placing a huge inflated rat along a main road, several hundred yards from the construction site entrances, but just 100 feet or so from the Hospital's main entrance, without explanation, the Union has knowingly given consumers the false impression that the Hospital is a "rat" employer. Simply affixing "Workers Temporary Staffing" to the rat's torso does nothing to clarify how, if at all, the Hospital is involved in a labor dispute. Assuming passing motorists can even read the words across the rat's torso, there is nothing to indicate that the Union's dispute is with WTS only, or that WTS is present only at the south tower construction site. Moreover, the Union agents wear no insignia to suggest they are associated with a building trade rather than a unit responsible for ensuring proper patient care, such as temporary nurses, technicians, or housekeepers. Thus, the Union's message would reasonably convey to the general public that the Hospital is the primary employer in the

citing Atlanta Typographical Union No. 48 (Times-Journal), 180 NLRB 1014, 1016 (1970)(union's misleading communications violated Section 8(b)(4)(ii)(B); signs failed to adequately identify the struck product or the primary employer). See also, Solien v. Carpenters District Council of Greater St. Louis, 623 F.Supp. 597, 604-605 (E.D. Mo. 1985), citing NLRB v. Retail Store Employees Local 1001 (Safeco), 447 U.S. 607, 616 (1980) (union's handbills were unlawful misleading, therefore, not protected by the First Amendment).

<sup>16</sup> See, e.g., San Antonio Community Hospital, above, 125 F.3d at 1236. See also, Local 79, LIUNA (Calleo Development Corp.), Cases 2-CC-2546, et al., Appeals Minute dated January 24, 2003.

labor dispute; such a misrepresentation is unlawful under Tree Fruits and its progeny.

The large illustration on the Union's handbill is similarly misleading: the cartoon depicts a rat in a patient's room, an alarmed nurse, and an ailing patient directly behind it. A janitor is present, cleaning rat droppings from the floor. A natural reading of the illustration is that the "rat" is adversely impacting the Hospital's ability to provide adequate patient care. Such representations are knowingly false, made without regard for the truth, and, therefore, are not protected under the First Amendment.

## B. The Union's Use Of An Inflated Rat, A Well-Known Symbol Of Labor Unrest, Is Tantamount To Picketing

Traditional union picketing involves individuals patrolling while carrying placards attached to sticks. The Board has long held, however, that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing. 18 On the other hand, the Board has stated that "'[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises.'"19 Along the same lines, "[t]he important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."20

<sup>&</sup>lt;sup>17</sup> See <u>San Antonio Community Hospital</u>, above, 125 F.3d at 1237.

<sup>18</sup> See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

<sup>19</sup> Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

<sup>20</sup> Stoltze Land & Lumber Co., above, 156 NLRB at 394; see also United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971).

Picketing involves a "'mixture of conduct and communication,'" and does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'" Thus, picketing is meant to cause those approaching the location of the demonstration to take some sympathetic action, such as not entering the facility involved. The Board has also recognized that the "conduct element" in picketing invokes a response regardless of any message.

In determining whether employees are engaged in <a href="DeBartolo">DeBartolo</a> handbilling or picketing, the Board looks to whether, under the totality of the circumstances, a union is using conduct, rather than speech, to induce a sympathetic response. For example, because of its confrontational and coercive nature, the presence of mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may constitute picketing. The photographing of neutrals as they pass through an entrance has also been found to be an indicium of picketing in circumstances where it is found to be coercive. The Board has even found that signs placed

<sup>21</sup> See <u>DeBartolo II</u>, above, 485 U.S. at 580, quoting <u>NLRB v.</u> Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (finding mass picketing in violation of 8(b)(4)(ii)(B) where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees); Service & Maintenance Employees Union No. 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for handbilling or publicity purposes)"); Truax-Traer Coal Co., above, 177 NLRB at 218 (finding picketing where approximately 200 union agents arrived at the worksite and congregated around or in their parked cars).

<sup>23</sup> See General Service Employees Union Local 73 (Andy Frain), 239 NLRB 295, 306, 307 (1978) (finding union's handbilling was picketing that violated 8(b)(4)(i) and (ii)(B) where union distributed handbills, displayed signs in parked cars, photographed neutrals, and previously picketed facility; finding union's photographing under

in proximity to the entrance may constitute picketing under certain circumstances.  $^{24}$ 

Here, the Union's deployment of a large inflated rat is not pure speech as defined in <u>DeBartolo II</u>, but the kind of "mixture of conduct and communication" intended to "provide[] the most persuasive deterrent to third persons about to enter a business establishment." Indeed, the totality of circumstances presented here — the Union's intentionally misleading communications; the deployment of a very large rat, a well-known symbol of a labor dispute, at a neutral employer's facility; the placement of the rat several hundred yards from the construction site entrances, but only about 100 feet from the Hospital's main entrance; the Union's failure to identify itself as the representative of building trade employees rather than Hospital workers—all establish that the Union was attempting to use conduct, rather than speech, to induce a sympathetic response. 26

Though the display of the rat does not include a specific request that consumers engage in a boycott of the Hospital, the Union's conduct confronts consumers and

circumstances inherently coercive where it took place at reserved neutral gate and where cameras had no film).

<sup>24</sup> See, e.g., Teamsters Local 182 (Woodward Motors), 135 NLRB 851, 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (finding picketing that violated 8(b)(7)(B) where the union stuck two picket signs, which were monitored by union agents from a nearby car, in a snowbank in front of the employer's facility after the union had engaged in three months of traditional picketing at the facility); see also Laborers Local 389 (Calcon Construction), 287 NLRB 570, 573 (1987) (union signs were placed at or near one or more of the entrances to common situs so that they could be read by anyone approaching them); Construction & General Laborers Local 304 (Athejen Corp.), 260 NLRB 1311, 1319 (1982) (union placed signs on safety cones, barricades, and on jobsite fence).

DeBartolo II, above, 485 U.S. at 580, quoting NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 US 607, 619 (1980).

<sup>26</sup> See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Carpenters Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965). See also Service Employees Local 87 (Trinity Maintenance), above, 312 NLRB at 743.

creates an invisible picket line that customers must cross to enter the Hospital. Thus "the restraint generated by the need to cross any such picket line may entirely inhibit consumers who are not whole-hearted union [supporters] but are unwilling to be readily identified as hostile or indifferent."<sup>27</sup> The reasonably foreseeable effect is that current and potential patrons of the Hospital will be dissuaded by the Union's conduct from entering, which, in turn, unlawfully coerces the Hospital to cease doing business with WTS.<sup>28</sup>

B.J.K.

Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 957 (D.C. Cir. 1968).

<sup>&</sup>lt;sup>28</sup> See generally <u>Safeco</u>, above, 447 U.S. 607; <u>Honolulu</u> <u>Typographical</u>, above, 401 F.2d at 957("[W]hen customers must refuse to respect a picket line in order to enter the store, the storekeeper is being threatened within the meaning of [Section 8(b)(4)(ii)(B)]".).